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14
15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17

18 WINSTAR PROPERTIES, LLC, a
19 limited liability company; and
20 MANHATTAN MANOR, LLC, a
California Limited Liability company,

21 Plaintiffs,

22 v.

23 EVANSTON INSURANCE
COMPANY, an Illinois corporation;
24 MARKEL SERVICE, INC., a
Virginia corporation; MARKEL
25 WEST, INC., a California
corporation; and DOES 1 through 50,
26 inclusive,

27 Defendants.
28

CASE NO. 2:18-cv-09989 JFW (KSx)

**JOINT REPORT ON EARLY
MEETING OF COUNSEL
PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 26(f)**

TRIAL DATE: None set

1 Plaintiffs WINSTAR PROPERTIES, LLC (“Winstar”) and
 2 MANHATTAN MANOR, LLC (“Manhattan Manor”) (collectively, “Plaintiffs”) and
 3 defendants EVANSTON INSURANCE COMPANY (“Evanston”),
 4 MARKEL SERVICE, INC. (“Markel Service”) and MARKEL WEST, INC.
 5 (“Markel West”) (collectively, “Defendants”) respectfully submit the following
 6 as their Joint Report of the Federal Rule of Civil Procedure (“FRCP”) 26(f) early
 7 meeting and proposed discovery plan. The Parties’ Joint Report includes the
 8 items requested in FRCP 26(f) and Local Rule 26-1.

9 The Parties conducted the first of several Rule 26(f) meetings on Monday,
 10 December 17, 2018, via teleconference. Participants at the meeting were Sara
 11 McClain, counsel for Plaintiffs, and Margret Parke, counsel for the Defendants.
 12 Counsel conferred again in person on Thursday, December 20, 2018 and have
 13 conferred via electronic mail and telephone several times thereafter.

14 **1. Subject Matter Jurisdiction, Personal Jurisdiction, Venue and Service**

15 Defendants removed this action to this Court based on diversity of
 16 citizenship pursuant to 28 U.S.C. § 1332. The Notice of Removal was based, in
 17 part, on the fraudulent joinder of defendant Markel West.

18 Plaintiffs dispute diversity exists and are filing a Motion to Remand the
 19 case to state court.

20 **2. Statement of Facts and Disputed Facts**

21 This is an insurance coverage dispute arising out of claims asserted against
 22 Plaintiffs in an underlying lawsuit entitled *Adela Hernandez et al. v. Winstar*
 23 *Properties, Inc., et al.*, U.S.D.C. Central District of California, Case No. 2-16-cv-
 24 04697-ODW-KS (the “Underlying Action”). In the Underlying Action, Plaintiffs
 25 were sued under the Federal Fair Housing Act by tenants of residential apartment
 26 units located in a building owed by Manhattan Manor and managed by Winstar.

27 Defendant Evanston Insurance Company (“Evanston”) issued a liability
 28 policy to Winstar and participated in the defense of Winstar and Manhattan

1 Manor under that policy in connection with the Underlying Action. The
2 Underlying Lawsuit ultimately settled after trial resulted in a jury verdict against
3 Plaintiffs. While Evanston participated in the defense of Plaintiffs in the
4 Underlying Action, it contested any duty to defend and indemnify under the
5 policy and Plaintiffs allege they funded the post-trial settlement.

6 Plaintiffs contend that the claims alleged and damages sought in the
7 Underlying Action were covered under the Evanston policy. Alternatively,
8 Plaintiffs contend that by Defendants' conduct, Evanston has waived or is
9 estopped for disclaiming coverage for the Underlying Action. Plaintiffs has
10 asserted causes of action against Defendants for Breach of Contract, Breach of
11 the Implied Covenant of Good Faith and Fair Dealing, Violation of Insurance
12 Code section 17200 et seq., and Negligent Misrepresentation.

13 Defendants dispute Plaintiffs' contentions and maintain, *inter alia*, that the
14 allegations and claims in the Underlying Action were neither covered nor
15 potentially covered under the Evanston policy issued to Winstar. Defendants
16 further maintain that the doctrines of the waiver or estoppel do not apply here
17 and do not operate to create coverage under the Evanston policy where none
18 exists.

19 **3. Disputed Points of Law**

20 The basic disputed issues of law in this case involve whether the claims
21 asserted in the Underlying Action are covered or potentially covered under the
22 Evanston policy issued to Winstar as required to trigger Evanston's duty to
23 defend or duty to indemnify Plaintiffs, and whether Evanston, by its conduct and
24 Plaintiffs' detrimental reliance thereon, is estopped from denying coverage.

25 Plaintiffs contend that Evanston owed a duty to defend and indemnify
26 Plaintiffs in connection with the Underlying Action. The operative pleading in
27 the Underlying Action alleged Plaintiffs' legally permissibly practice of issuing
28 rent increases caused a disparate impact on tenants who were members of a

1 protected class, and therefore, amounted to discrimination in violation of 42
2 U.S.C. §§ 3604(a)-(b). Plaintiffs contend such claims are actually and expressly
3 covered under the terms of the Policy. Plaintiffs in the Underlying Action sought
4 economic and non-economic compensatory damages, as well as attorneys' fees
5 and costs, which Plaintiffs contend are actually and expressly covered under the
6 terms of the Policy. Accordingly, Defendants allegedly were obligated under the
7 Policy to defend Plaintiffs, make reasonable efforts to settle the Underlying
8 Action, and accept reasonable settlement demands within the limits of the Policy
9 so as to avoid exposing Plaintiffs to personal liability vis a vis an excess
10 judgment. An insurer "must defend a suit which *potentially* seeks damages
11 within the coverage of the policy." Gray v. Zurich Ins. Co., 65 Cal.2d 263, 275
12 (1966) (emphasis in original).

13 Plaintiffs contend Defendants breached the duty to indemnify by failing to
14 make reasonable efforts to settle the Underlying Action, and accept reasonable
15 settlement demands within the limits of the Policy. As a result of this alleged
16 failure, Plaintiffs were exposed personal liability vis a vis an excess judgment.
17 Plaintiffs contend they were later forced to fund a settlement of the Underlying
18 Action because Defendants agreed to pay \$100,000 on behalf of Plaintiffs to
19 settle the case, but only if Plaintiffs signed a full waiver and release of any all
20 claims against Defendants relating to the Underlying Action, including any
21 claims for breach of contract or bad faith. Defendants also threatened to initiate
22 litigation against Plaintiffs to recover amounts incurred in defending Plaintiffs in
23 the Underlying Action if Plaintiffs did not agree to the waiver and release. Based
24 on this conduct, Plaintiffs allege Defendants are liable for breach of contract,
25 breach of the implied covenant of good faith and fair dealing, and unfair business
26 practices under Business & Professions Code section 17200. The implied
27 covenant of good faith and fair dealing obligates the insurer to accept reasonable
28 settlement demands within policy limits in order to avoid exposing its insured to

1 personal liability in excess of those limits. Comunale v. Traders & Gen. Ins. Co.
2 50 Cal.2d 654, 659 (1958).

3 Moreover, Plaintiffs contend Defendants waived the right to contest
4 coverage by failing to properly reserve the right to deny coverage. “If a liability
5 insurer, with knowledge of a ground of forfeiture or noncoverage under the
6 policy, assumes and conducts the defense of an action brought against the
7 insured, without disclaiming liability and giving notice of its reservation of
8 rights, it is thereafter precluded in an action upon the policy from setting up such
9 ground of forfeiture or noncoverage.” Miller v. Elite Ins. Co., 100 Cal.App.3d
10 739, 755 (1980); see DeWitt v. Monterey Ins. Co. (2012) 204 Cal.App.4th 233,
11 245-246.

12 Plaintiffs further contend that Defendants, and in particular Markel West,
13 are liable for negligent misrepresentation for repeatedly representing to Plaintiffs
14 that they were both covered under the policy. Bock v. Hansen, 225 Cal.App.4th
15 215, 228 (2014).

16 Evanston contends that it did not owe a duty to defend and does not owe a
17 duty to indemnify Plaintiffs in the Underlying Action including because (1)
18 Manhattan Manor is not an insured under the Evanston policy; (2) under the
19 terms of the insuring agreement in the Evanston policy, coverage only applies,
20 *inter alia*, if “[t]he entirety of the **Wrongful Discrimination** happens during the
21 **Policy Period** or on or after the **Retroactive Date** stated in Item 4. of the
22 Declarations and before the end of the **Policy Period**” and this requirement is not
23 satisfied by the Underlying Action (3) under the terms of the insuring agreement
24 in the Evanston policy, coverage only applies to a Claim first made against the
25 Insured during the Policy Period and timely reported and only if, prior to the
26 inception of the Policy, “the **Insured** had no knowledge of such **Wrongful**
27 **Discrimination** or any fact, circumstance, situation or incident which may have
28 led a reasonable person in the **Insured’s** position to conclude that a **Claim** was

1 likely” and these requirements are not satisfied; and (4) Plaintiffs failed to
2 provide timely notice of the Underlying Lawsuit pursuant to the “Claim
3 Reporting Provision” of the Evanston policy. Additionally, Defendants dispute
4 that Markel Service and Markel West, who are not parties to the insurance
5 contract, can be liable for breach of the insurance policy or breach of the implied
6 covenant of good faith and fair dealing. *Otworth v. Southern Pac. Transp. Co.*,
7 166 Cal.App.3d 452, 458 (1985); *Gutierrez v. State Farm Mutual Ins. Co.*, 2012
8 U.S. Dist. LEXIS 14789 (N.D. Cal. 2012); *Minnesota Mut. Life Ins. Co. v.*
9 *Ensley*, 174 F.3d 977, 981 (9th Cir. 1999).

10 Markel Service and Markel West, as the alleged claims adjuster and/or
11 claims administrator for Evanston in connection with the Evanston policy, also
12 dispute Plaintiffs’ claim that they were part of a joint venture with Evanston.

13 Evanston, Markel West, and Markel Service dispute any liability in
14 connection with Plaintiffs’ claim for violation of Business & Professions Code
15 section 17200 because the injunctive relief sought by Plaintiffs in this cause of
16 action is not available where, as here, there is an adequate remedy at law.
17 *Canova v. Trs. of Imperial Irrigation Dist. Emp. Pension Plan*, 150 Cal.App.4th
18 1487, 1497 (2007); *Heighley v. J.C. Penney Life Ins. Co.*, 257 F.Supp.2d 1241,
19 1259-1260 (C.D. Cal. 2003). Additionally, Plaintiffs have not pled that
20 “irreparable injury” will result if an injunction is not ordered. *Brownfield v.*
21 *Daniel Freeman Marina Hospital*, 208 Cal.App.3d 405, 410 (1989). Further,
22 Plaintiffs’ section 17200 claim and request for injunctive relief fail because,
23 contrary to settled law, the only claims asserted by Plaintiffs in their complaint
24 are premised on alleged wrongful conduct that has already occurred. *Madrid v.*
25 *Perot Systems Corp.*, 130 Cal.App.4th 440, 465 (2005).

26 Evanston, Markel West, and Markel Service dispute any liability in
27 connection with Plaintiffs’ claim for negligent misrepresentation. Markel Service
28 and Markel West face no liability in connection with this claim under California

1 law as they owe no duty to Plaintiffs. *Friedman v. Merck & Co.*, 107
 2 Cal.App.4th 454, 477 (2003); *Feizbakhsh v. Travelers Commer. Ins. Co.*, 2016
 3 U.S. Dist. LEXIS 123471 (C.D. Cal. 2016). Further, all Defendants maintain that
 4 Plaintiffs have not and cannot allege the elements necessary to state a claim for
 5 negligent misrepresentation with the specificity required under California law.
 6 Finally, Plaintiffs' allegations that Evanston breached an insurance contract
 7 cannot form the basis of a claim for negligent misrepresentation. *Harlow v.*
 8 *American Equitable Ins. Co.*, 87 Cal.App.2d, 32 (1927); *see also Careau & Co.*
 9 *v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1395 (1990).

10 In addition to the foregoing, Defendants maintain that Plaintiffs' reliance
 11 on the doctrines of waiver or estoppel do not create coverage under the Evanston
 12 policy issued to Winstar where none exists for the Underlying Action. *Advanced*
 13 *Network, Inc. v. Peerless Ins. Co.*, 190 Cal.App.4th 1054, 1066 (2010), citing
 14 *Aetna Casualty & Surety Co. v. Richmond*, 76 Cal.App.3d 645, 653 (1977);
 15 *Miller v. Elite Ins. Co.*, 100 Cal.App.3d 739, 755 (1980). Additionally, there is
 16 no waiver in this case as Evanston did not intentionally relinquish a known right
 17 with knowledge of the facts. *Ringler Associates Ins. v. Maryland Casualty Co.*,
 18 80 Cal.App.4th 1165, 1188 (2000). Further, Plaintiffs cannot meet their burden
 19 to establish estoppel. *Ringler, supra*, 80 Cal.App.4th at p. 1190, citing *State*
 20 *Farm Fire & Casualty Co. v. Jioras*, 24 Cal.App.4th 1619, 1627-1628 (1994).

21 **4. Prior, Pending, and Anticipated Motions**

22 Currently pending before the Court are the Motions to Dismiss filed by
 23 Evanston, Markel Service, and Markel West, and Plaintiffs' Motion to Remand.
 24 All of these Motions have been noticed for hearing on January 28, 2019. Should
 25 Defendants' motions not result in dismissal of Markel Service and Markel West,
 26 and the Court denies Plaintiffs' Motion to Remand, the parties anticipate filing
 27 summary judgment motions regarding the (1) question of Evanston's duty to
 28 defend and indemnify under the Evanston policy; and (2) if coverage is not

owed, whether Evanston is estopped or deemed to have waived the right to contest coverage under the Evanston policy for the Underlying Action.

5. Status of Pleadings and Amendment or Dismissal of Any Pleadings

Plaintiffs do not anticipate any amendments to the complaint, or dismissal of any parties, subject to the outcome on Defendants' Motions to Dismiss.

6. Initial FRCP Rule 26 Disclosures

Both parties will timely exchange the FRCP Rule 26(f) initial disclosures. The disclosures will identify all of the witnesses and documents currently known to support the parties' respective allegations and contentions.

7. Proposed Discovery Plan

No discovery has been conducted to date. Following the Court's rulings on Defendants' Motions to Dismiss and Plaintiffs' Motion to Remand, the parties will undertake initial written discovery and exchange of documents, followed by depositions if oral testimony is necessary

8. Related Cases

The underlying tenant discrimination action titled *Adela Hernandez et al. v. Winstar Properties, Inc., et al.*, U.S.D.C. Central District of California, Case No. 2-16-cv-04697-ODW-KS. Additionally, Evanston filed a separate action in the Central District against Winstar and Manhattan Manor seeking, *inter alia*, declarations relating to insurance coverage under the policy issued to Winstar for the Underlying Action, titled *Evanston Insurance Company v. Winstar Properties, Inc., et al.*, U.S.D.C. Case No. 2:18-cv-7740-R-KES. This action is currently pending before the Honorable Manuel L. Real.

9. Relief Sought in Complaint

Plaintiffs seek the following damages against Defendants:

- \$1.3 million representing the amount Plaintiffs were forced to pay to settle the Underlying Action;
- Interest accruing on line of credit Plaintiffs were forced to take out to fund

1 the settlement;

- 2 • Attorneys' fees in excess of \$200,000 for hiring counsel to represent
- 3 Manhattan Manor at the second trial and for negotiating the settlement of
- 4 the Underlying Action;
- 5 • Attorneys' fees incurred in prosecuting the bad faith action pursuant to
- 6 Brandt v. Superior Court, 37 Cal.App.3d 813 (1985)
- 7 • Attorneys' fees and costs incurred in defending Defendants' declaratory
- 8 relief action filed against Plaintiffs in an amount to be determined at trial;
- 9 • Punitive damages in an amount to be determined at trial;
- 10 • Injunction prohibiting Defendants from further engaging in unlawful,
- 11 unfair or fraudulent business acts and practices within the State of
- 12 California

13 **10. Interested Parties**

14 Defendants complied with Local Rule 7.1-1 by filing their respective
 15 Certification and Notice of Interested Parties. (Doc. #3.) Plaintiffs will file their
 16 certification concurrent with the filing of this report. Pursuant to Defendants'
 17 Certification and Notice of Interested Parties, the following listed parties may
 18 have a pecuniary interest in the outcome of this case: Winstar Properties, LLC;
 19 Manhattan Manor, LLC; and Evanston Insurance Company, a subsidiary of
 20 Markel Corporation.

21 **11. Proposed Cut-Off and Trial Related Dates**

22 The parties propose August 30, 2019 as the last date for the completion of
 23 discovery and November 1, 2019 as the last date for hearing motions for
 24 summary judgment. The parties propose December 6, 2019 for the final pre-trial
 25 conference and a January 21, 2020 trial date.

26 **12. Jury or Non-Jury Trial and Trial Length Estimates**

27 Plaintiffs demand a jury trial. The parties estimate trial will be
 28 approximately 7 days.

1 **13. Settlement Efforts and ADR Selection**

2 The parties have informally discussed settlement possibilities, but that
3 effort has so far been unsuccessful. Pursuant to Local Rules 16-15.4 and 26-1(c),
4 the parties elect ADR Local Rule 16-15.4 Procedure No. 3 (appearance before a
5 private mediator).

6 **14. Complex Manual**

7 Pursuant to Local Rule 26-1(a), the parties agree that the Manual for
8 Complex Litigation does not need to be utilized for this action.

9 **15. Dispositive Motions**

10 Likely future motions are discussed in Item 4 above.

11 **16. Unusual Legal Issues**

12 The parties are currently unaware of any unusual legal issues requiring
13 consideration.

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1 **17. Proposals Regarding Severance, Bifurcation or Other Ordering of**
2 **Proof**

3 **Local Rule 26-1(e) – Likelihood of Additional Parties**

4 The parties do not currently anticipate any additional parties.

5 **Local Rule 26-1(f) – Disclosure of Expert Witnesses and Testimony**

6 The parties propose that expert witness disclosures pursuant to FRCP Rule
7 26(a)(2) shall be completed 90 days before trial, with rebuttal expert disclosures
8 completed 30 days after the other party's disclosure.

9 Lead trial counsel for the parties, Boris Treyzon (btreyzon@acts.com) for
10 Plaintiffs and Matthew S. Foy (mfoy@grsm.com) for Defendants are registered
11 ECF Users.

12
13 Dated: December 26, 2018

**ABIR COHEN TREYZON SALO,
LLP**

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15
16 Bv: 

Boris Treyzon, Esq.

Douglas R. Rothen, Esq.

Sara A. McClain, Esq.

Attorneys for Plaintiffs

**WINSTAR PROPERTIES, LLC and
MANHATTAN MANOR, LLC.**

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21 Dated: December 26, 2018

GORDON & REESE LLP

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23 Bv: /s/ Matthew S. Foy, Esq.

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**EVANSTON INSURANCE
COMPANY, MARKEL SERVICE,
INC., and MARKEL WEST, INC.**